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neer. He was indeed away part of the time towards the end of the work, but the proof is that he was there a part of the time during the last year, and there after the work was completed: and no application was made to the railroad company for his presence at any time to revise the estimates, or for the appointment of any other engineer in case of his absence.

It is of prime importance that parties be held to their contracts. If permitted to cut themselves loose from an onerous stipulation, because it may be inconvenient to perform it, there can be no certainty in agreements. The obligation of a covenant is not changed by the fact that it has not worked the results which were anticipated.

There are other assignments of error in this record which we need not notice in detail. What we have said will probably put an end to the case. And the other questions attempted to be raised are therefore of no importance.

Judgment reversed, and a *venire de novo* awarded.

AGNEW, J., dissented.

In the District Court of the United States for the District of Wisconsin.

THE UNITED STATES v. THE PROPELLER GOVERNOR CUSHMAN ;
DWIGHT SCOTT, CLAIMANT.¹

Under the Act of Congress which provides that no distilled spirits (arrack and sweet cordial excepted) shall be imported into the United States, except in casks or vessels of the capacity of ninety gallons wine measure and upwards, on pain of forfeiture of such spirits and also of the ship or vessel in which the same may have been imported (1 Stat. at Large, p. 701, § 103) : *Held*, that where such distilled spirits had been received on board secretly by employees or servants of the vessel, without the knowledge of the captain or clerk, and in violation of a standing rule and positive order, the owners of the vessel would not be liable for their loss, since they formed no part of the cargo to be placed in the manifest, as such ; nor would the vessel be subject to forfeiture under the circumstances, though such portion of the spirits as were not allowed by law might be liable to seizure.

The opinion was delivered by

MILLER, District Judge.—This propeller was seized by the collector at the port of Milwaukee, on the 7th day of August 1865.

¹ We are indebted for this case to the courtesy of Hon. A. G. MILLER, District Judge of Wisconsin.—EDS. AM. LAW REG.

The information alleges and propounds as causes for the seizure : 1st. That distilled spirits in jugs and bottles, and not in casks or vessels of the capacity of ninety gallons wine measure and upwards, said jugs and bottles containing less than ninety gallons wine measure each, were imported and brought in the propeller, not being for the use of the seamen on board, from the port of Sarnia, in Canada, to Big Summer Island and Fox Island, in the United States, contrary to the 103d section of the Act of Congress approved March 2d 1799. 2d. That brandy contained in jugs and bottles, and not in casks or vessels of the capacity of fifteen gallons and upwards, was imported and brought in said propeller to the port of Milwaukee, in the United States, from the port of Sarnia, in Canada, the same not being for the use of the seamen on board. 3d. That no manifest containing the said jugs and bottles of distilled spirits was exhibited at the first port in the United States as required by law.

The vessel was seized in pursuance of information from one Royall Campbell, who had been employed as mate, and was discharged for drunkenness and incapacity for duty.

From the opening of navigation, in the spring of 1865, until seized, the vessel was running between Green Bay and Sarnia, Chicago and Milwaukee and Buffalo, touching at Sarnia.

The cook and a waiter, on the 12th of May 1865, secretly in the night-time, at Sarnia, purchased and had brought on board the vessel, three gallons of whiskey, three gallons of brandy, and three gallons of gin. On the 23d of the same month, at Sarnia, they secretly in the night-time purchased and had brought on board, three gallons of whiskey. And on the 1st of June, at Sarnia, they, in the same manner, and at night, purchased and had brought on board three gallons of whiskey.

It was a standing rule of the vessel that no distilled spirits should be brought on board at Canada ports, by employees. And the cook and waiter being aware of the rule, and also of the positive orders of the captain to that effect, in purchasing ship-stores at Sarnia, requested that the jugs containing spirits purchased of a grocer there, be secreted in barrels under the stores. They deposited the jugs of spirits in a state-room occupied by the waiter, and in a pantry adjoining the kitchen, out of view. Distilled spirits were purchased at Chicago and Milwaukee by officers and men, in the several trips of the vessel. Whiskey was delivered

to workmen at Summer Island and Fox Island. And at these places men drank on board secretly and carried in bottles placed in their pockets, some of the spirits smuggled at Sarnia with some purchased at American ports. The cook received payment for those spirits so sold.

The clerk and the owner of the pier at Fox Island settled for whiskey some of the men had purchased of the cook, by crediting the amount on a bill of wood supplied the vessel, under the belief that the liquor had been brought from Chicago or Milwaukee. The captain and clerk drank liquor handed them by the cook, without compensation. They had no knowledge that any distilled spirits had been brought on board at Sarnia or any other Canadian port, by any of the hands, except a case of gin ordered by the captain, until the vessel was seized.

By § 103 of an Act of Congress approved March 2d 1799, 1 Stat. at Large 701, no distilled spirits (arrack and sweet cordial excepted) shall be imported or brought into the United States, except in casks or vessels of the capacity of ninety gallons wine measure and upwards, on pain of forfeiture of the said distilled spirits imported contrary to the provisions described, together with the ship or vessel in which they shall be so imported: *Provided*, That nothing contained in this act shall be construed to forfeit any spirits for being imported or brought into the United States, in other casks or vessels, or the ship or vessel in which they shall be brought, if such spirits shall be for the use of the seamen on board such ship or vessel, and shall not exceed the quantity of four gallons for each seaman. And by § 1 of an act approved March 2d 1827, 4 Stat. at Large 238, brandy may be imported into the United States in casks of a capacity not less than fifteen gallons.

It is conceded that the owners of a ship or vessel are liable for the acts of the captain, as their agent, in the discharge of his official duties, but the cook and waiter are mere employees, as hands on board under the control of the captain, and may be discharged at his will, subject to provisions of law and the terms of their employment.

A cargo of a vessel is the lading of a ship or vessel; the merchandise or wares contained and conveyed in a ship or vessel.

A vessel is not liable to forfeiture for every apparent violation or breach of the Revenue Laws, in regard to the cargo. Acci-

dental mistakes may be accounted for and explained. Where actions, suits, or informations are brought for penalties or seizures, and the government make out a *prima facie* case, section 71 of the Act of March 2d 1799 throws the burden of explanation upon the claimant: *The Luminary*, 8 Wheat. 407. And by section 67 of the same act the officers of the customs, after entry made of goods, wares, or merchandise, may, on suspicion of fraud, open and examine the packages. And if any of the packages so examined shall be found to differ in their contents from the entry, then the contents of such packages shall be forfeited: *Provided*, that the said forfeiture shall not be incurred, if it shall be made to appear to the satisfaction of the officer, or the court in which a prosecution shall be had, that such difference proceeded from accident or mistake, and not from an intention to defraud the revenue. In *The United States v. Nine Packages of Linen*, 1 Paine's C. C. Rep., it is decided that when goods are libelled, under the said section 67, for disagreeing with the entries, and the claimant sets up mistake as an excuse, the circumstance that probable cause of seizure has been made out, does not impose on the claimant the necessity of making out an unusually clear case of mistake. All he has to do is to produce ordinary proof. It was there holden, as sufficient and legal excuse for an incorrect entry of goods, that they were entered from an invoice made out in great hurry and agitation, while the goods were packed at Caen, in the absence of the owner, in order to secure them by removal from an apprehended pillage by Prussian soldiery who occupied the place. It seems to be the policy of the law, that intention to defraud the revenue may be a proper subject of inquiry, and to allow the claimant to show an accidental omission or neglect: *The United States v. The Margaret Gates*, 22 Verm. 603.

The distilled spirits mentioned in the information having been received on board secretly by employees or servants of the vessel, without the knowledge of the captain or clerk, and in violation of a standing rule and positive order, the owners of the vessel would not be liable for their loss. They formed no part of the cargo, to be placed in the manifest as such. Nor should the vessel be subject to forfeiture under the circumstances. The spirits or such portion as the cook and waiter were not allowed by law might be liable to seizure.

In the case of *Philo v. The Ship Anna*, 1 Dall. 197, it appeared in evidence that the captain of the vessel had only exhibited twenty hampers of porter in his official manifest, while a much greater quantity was found on board the ship, besides forty-two hampers landed and deposited in the store of one Smith, and twenty-four hampers actually delivered on shore to the captain himself, agreeably to his order given for that purpose, in the store of claimants. It was known likewise that a considerable number of hampers of porter had during the passage been removed from the hold and stored away in state-rooms, filling them from the floor to the ceiling. And it appeared that the owners and their agents had been on board before the removal of the hampers from that situation, and must have seen them. The gross number of the hampers discovered by the informants was computed at a little over eighteen tons. The vessel was rightly condemned, but the charge of the court is instructive in the following remark: "The case in *Bunburg* is the single one that reaches the point before us. There the question arises whether the goods put on board secretly, and unloaded without the knowledge of the captain, would occasion a confiscation; and judges agreed that if it was a small matter, and no part of the cargo, it would not. The claimant, therefore, to have the benefit of this case should show: 1st, That the subject of the present prosecution is a small matter; 2d, That it was no part of the cargo; 3d, That it was smuggled without the knowledge of the captain." All these positions are satisfactorily established in favor of claimant. The distilled spirits taken on board in the darkness of the night at Sarnia, on the three several occasions by the cook and waiter, were no part of the cargo, were smuggled without the knowledge of the captain or clerk, and they were a very small matter not deserving the seizure of the vessel by the collector, in the strict enforcement of the Revenue Law, according to their requirements.

The law under which the information is brought allows to each seaman a quantity of distilled spirits for his use on board, not exceeding four gallons. The cook, steward, and waiters in lake vessels are considered and classed as seamen or mariners. They are a necessary part of the crew. They frequently assist in the navigation and care of the vessel at times of pressing necessity. They are allowed a lien in the admiralty for their wages in

common with the sailors: Flanders on Maritime Law, §§ 438, 439, 440, and notes.

On the 12th of May the cook and waiter brought on board nine gallons of spirits; on the two subsequent occasions they brought on board three gallons. If by the law these men were entitled to bring into the United States four gallons for each to be used on board, on every trip of the vessel, then they only exceeded their allowance as to quantity on one occasion, to the amount of one gallon.

The policy of the law will not allow seamen to smuggle on board even their own allowance of distilled spirits. The captain is responsible for the acts of the seamen in this particular, in all cases coming to his knowledge. If he consents to such traffic, or connives at it, he may subject his vessel to seizure.

The captain and clerk may have drunk of these liquors without knowledge or suspicion of their having been brought on board at Sarnia secretly, or that the cook and waiter were making merchandise of them. Distilled spirits having been brought on board, on all the trips of the vessel at American ports, and freely used and disposed of, the captain and clerk might not suspect that Canada liquors were either drunk or purchased at Big Summer and Fox Islands, by persons not belonging to the vessel. The spirits smuggled at Sarnia, being of small bulk and stored away in disregard of the captain's orders and a standing rule of the vessel, the testimony of the captain and clerk that they had no idea that the spirits they drank on board or that were drunk by others had been smuggled at Sarnia, is entitled to favorable consideration. It is not probable that this traffic in foreign distilled spirits on board the vessel would be allowed. Domestic spirits may be drunk and sold on board without risk of forfeiture of either the spirits or the vessel. And it is no cause of forfeiture under the act, for a seaman to extend the courtesy of his bottle of foreign spirits to an officer without compensation, in the absence of knowledge on the part of the officer that such spirits had been smuggled.

The captain had a legal right to order on board the case of gin, not exceeding four gallons, which he used on board.

The distilled spirits mentioned in the information not having been received on board as part of the cargo, it was not placed in the manifest, and the vessel is not liable for not exhibiting a

manifest containing it, at the first American port touched at after leaving Sarnia.

I am satisfied that the information should be dismissed.

Supreme Court of New York, Seventh District.

NATHANIEL R. PORTER v. JOHN MOUNT AND HARRIET MOUNT.

In an action for money had and received, for usurious interest, against husband and wife, not as such but as joint debtors simply, where they defended separately and a verdict was given against the wife alone, the jury not passing on the husband's defence, the plaintiff was allowed to discontinue his complaint against the husband and retain his verdict against the wife.

Where the agent of the lender bargains for and obtains excess of interest for his own use and benefit alone, but with the knowledge of the principal, per JOHNSON, P. J., and J. C. SMITH, J., the usury affects the whole transaction and the principal is liable for it; per E. D. SMITH, J., the principal should not be liable unless the bonus or excess given to the agent was made a condition of the loan.

The case of *Condit v. Baldwin*, 21 New York Rep. 224, observed upon.

Permission to the jury to take out with them papers or written documents used as evidence on the trial, is entirely within the discretion of the judge presiding at the trial, without regard to the consent of parties.

R. L. Dorr & Scott Lord, for plaintiff.

Bemis & Stevens, for defendants.

The opinion of the court was delivered by

E. DARWIN SMITH, J.—When this case was before us on a former occasion (vide 3 Am. Law Reg. N. S. 493), it came up on a motion for a new trial, the plaintiff having been nonsuited at the circuit on the ground chiefly that the action was barred by the statute limiting actions by the borrower against the lender, for usury paid, to the period of one year after such payment. And the question raised and discussed was, whether a married woman having a separate estate and loaning money on usury, was liable to be sued for the excess received over legal interest, so as to charge her separate estate.

We held that the action was not barred by statute, but lay at common law, and as for money had and received, and granted a new trial on both grounds. Vide 41 Barb. 562.

On the second trial the jury having found a verdict against